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BEFORE THE HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

"Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environmental and Natural Resources Divisions and the U.S. Trustee Program"

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Rayburn House Office Building
Washington, DC 20515
Room 2141

Good afternoon Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee. My name is Daniel Epstein and I am the Executive Director of Cause of Action, a non-profit, nonpartisan strategic oversight group committed to ensuring that the regulatory process is transparent, fair, and accountable.[1] Cause of Action uses various investigative and legal tools to educate the public about the importance of transparency and accountability in the Federal government. We consider our efforts to be a vital form of public oversight that supplements the important efforts of Congress.

I appreciate the opportunity to testify today about oversight of the Department of Justice ("DOJ"), particularly its Tax Division. For the better part of a year, Cause of Action has examined the legal and ethical concerns raised by the detailing of DOJ Tax Division attorneys to the Office of White House Counsel, in order to advise the President. Cause of Action, through a number of Freedom of Information Act ("FOIA") requests, has found that the detailing of Tax Division attorneys to the White House has been unique to the current Administration where, since 2009, these attorneys, many involved in controversial matters involving confidential tax records, have served the President as "clearance counsel" – that is, vetting the President's nominees by examining their tax records. During our examination of these White House details, we found no evidence of policies, procedures, rules and/or guidelines that exist to ensure that detailed attorneys are appropriately screened to prevent confidential taxpayer returns and/or return information from being unlawfully accessed or disclosed. This means Americans' most private information may be inappropriately disclosed to the White House.[2]

Detailing of DOJ Tax Attorneys to the White House Raises Serious Concerns

Federal law permits employees of any "department, agency, or independent establishment of the executive branch" to be detailed to the White House in order to assist and advise the President.[3] Cause of Action's examination of available records concerning Department of Justice attorney details to the White House indicate that the White House has historically sought detailees outside the DOJ's Tax Division. However, the current Administration appears to rely primarily upon Tax Division attorneys as the source for its detailed clearance counsels.[4] In 2004 and 2005, for example, Logan E. Sawyer and Ann L. Loughlin were detailed to the White House.[5] These individuals were employed in the Office of Consumer Litigation, Civil Division,

[1] CAUSE OF ACTION, http://www.causeofaction.org (last visited May 15, 2015).
[2] Press Release, Cause of Action Statement on White House and IRS Targeting (Nov. 25, 2014) (reporting that the Treasury Inspector General for Tax Administration admitted there exist nearly 2,500 potentially responsive documents relating to investigations of improper disclosures of confidential taxpayer information by the IRS to the White House), *available at* http://causeofaction.org/cause-action-statement-white-house-irs-targeting/; Paul Bedard, *Revealed: 2,500 new documents in IRS/W.H. harassment cases*, WASH. EXAM'R (Nov. 25, 2014), http://goo.gl/31zINY; *see also, e.g.*, Vicki Needham, THE HILL (Feb. 24, 2015), http://goo.gl/kG9IjN.
[3] 3 U.S.C. § 112-13; *see, e.g.*, Robert F. Diegelman, Acting Ass't. Att'y Gen. for Admin., Memorandum to the Heads of Department Components Concerning the Approval of and Reimbursement for White House and Other Details (Aug. 30, 2002), *available at* http://goo.gl/2IhRoN.
[4] *See* Exhibit 1 (based on information from President's Annual Report to Congress on White House Staff, compilation of individuals described as attorney-detailees during past two Administrations).
[5] *2004 White House Office Staff List – By Title*, WASH. POST, http://goo.gl/3boLyX (last visited May 15, 2015); *2005 White House Office Staff List – By Salary*, WASH. POST, http://goo.gl/CwJH5w (last visited May 15, 2015).

and the Employment Litigation Section, Civil Rights Division, respectively.[6] Despite a FOIA request submitted in October 2014, the Tax Division has failed to provide any records of attorneys detailed to the White House during the Bush administration (from January 20, 2001, as requested by Cause of Action's FOIA request).[7] In contrast, Cause of Action has identified at least ten attorneys who have been detailed between April 2009 and the present.[8] These individuals typically serve as "clearance counsel," vetting potential candidates for appointment by the President to high-ranking government posts.[9] All of these detailed attorneys came from the Tax Division.

The detailing of Tax Division attorneys to the White House is of serious concern to Congress because these lawyers, while at the Justice Department, obtain unique access to the confidential taxpayer information of parties under investigation or in litigation with the United States; then, while at the White House, they obtain access to the confidential tax information of the President's nominees for executive and judicial appointments. Indeed, taxpayer confidentiality laws prohibit the President from accessing the information accessed during a DOJ lawyer's official duties, even if that lawyer is later detailed to the White House.[10]

Cause of Action has, to date, not been able to obtain a single record evidencing the existence of safeguards to protect information obtained by DOJ from being accessed by the White House. On April 15, 2015, Cause of Action submitted a FOIA request to the Professional Responsibility Advisory Office, which provides prompt, consistent advice to Department attorneys with respect to professional responsibility.[11] We sought records evidencing the existence of safeguards against disclosure of confidential, sensitive, or proprietary information by DOJ attorneys, whether obtained prior to or during the course of a detail.[12] Ignoring its statutory obligation to respond within 20 days, the Professional Responsibility Advisory Office has yet to produce a single responsive record.[13]

Cause of Action additionally sent an April 15, 2015 FOIA request to DOJ's Office of Professional Responsibility ("OPR"), which is responsible for investigating allegations of misconduct involving Department attorneys.[14] Cause of Action sought records of complaints or allegations of misconduct in connection with the improper disclosure of tax information by DOJ

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[6] *See, e.g.*, Resume for Logan Everett Sawyer III, *available at* http://goo.gl/CXDnVv (last visited May 15, 2015); Compl. at 4 (signature line), *Jane Doe III, et al. v. District of Columbia*, No. 02-2340, *available at* http://goo.gl/RVtycM.

[7] *See* Exhibit 2 (Letter from Carmen M. Banerjee, Tax Div., Dep't of Justice, to Cause of Action at 2 (Mar. 17, 2015)) (DOJ identifying nine individuals in response to FOIA request).

[8] *See id.*; *see also* LinkedIn Profile of Carina Federico (Tax Division attorney currently on detail as Deputy Associate Counsel of Presidential Personnel) (on file with Cause of Action).

[9] *See generally* Mary Anne Borrelli, *et al.*, THE WHITE HOUSE TRANSITION PROJECT: THE WHITE HOUSE COUNSEL'S OFFICE NO. 2009-29 at 32 (2009), *available at* http://goo.gl/Nxn3KX.

[10] I.R.C. §§ 6103(g), (h)(2).

[11] PRAO, DEP'T OF JUSTICE, http://www.justice.gov/prao (last visited May 15, 2015).

[12] *See* Exhibit 3 (Letter from Michael Kingsley, PRAO, Dep't of Justice (May 13, 2015; though dated March 13 by DOJ in error)); *see also* Press Release, Cause of Action, *CoA Uncovers Questionable Practice between the DOJ and White House* (Apr. 15, 2015), *available at* http://causeofaction.org/coa-uncovers-questionable-practice-between-the-doj-and-white-house/.

[13] *See* 5 U.S.C. § 552(a)(6)(A)(i).

[14] OPR, DEP'T OF JUSTICE, http://www.justice.gov/opr (last visited May 15, 2015).

attorneys detailed to another department or agency. The Office of Professional Responsibility responded that its search revealed no responsive records.[15]

Tax Division Attorneys Involved in Targeting Litigation were Subsequently Detailed to the White House

To illustrate the importance of appropriate screens and the risks presented through the process of detailing attorneys who access confidential and potentially politically-sensitive information, consider Norah E. Bringer, a trial attorney in the Tax Division, and Andrew C. Strelka, a former Tax Division attorney. Ms. Bringer was detailed to the White House as a "clearance counsel" for the President in June 2014 and recently returned to DOJ as Counsel to Caroline Ciraolo, the Acting Assistant Attorney General for Tax – who is responsible for overseeing the entire Tax Division.[16] Mr. Strelka, who is currently in private practice, preceded Ms. Bringer as the Tax Division's detailee at the White House.[17]

Prior to their details, Ms. Bringer and Mr. Strelka served as trial attorneys involved in litigation concerning the IRS's targeting of political groups. Specifically, they represented IRS Commissioner John Koskinen in a lawsuit against Z Street, Inc., an organization dedicated to public education activities, which was subject to "extra scrutiny" when it applied for 26 U.S.C. § 501(c)(3) tax-exempt status.[18] During recent oral argument for *Z Street, Inc. v. Koskinen*, the D.C. Circuit took issue with the IRS for implying that it could subject Z Street to heightened scrutiny in connection with its application for tax-exempt status for approximately 270 days, in order to force Z Street to exhaust an administrative remedy before obtaining constitutional relief.[19] During the course of Ms. Bringer's representation in this and other cases, she accessed confidential taxpayer return information, and it is reasonable to assume that Mr. Strelka did the same.[20] Yet, based on responses to FOIA requests received to date, there is no evidence that any ethical or legal safeguards were in place to ensure that private information was not disclosed – even inadvertently – to the White House.

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[15] *See* Exhibit 4 (Letter from Lyn Hardy, OPR, Dep't of Justice, to Cause of Action (Apr. 24, 2015)). This response leaves open the question of whether responsive records actually exist, but that such records fall into one of the three discrete categories of law enforcement or national security records excluded from FOIA. *See id.*; Dep't of Justice, FOIA Guide: "Exclusions" (May 2004), *available at* http://goo.gl/jfd7KR (discussing exclusions under FOIA).

[16] *See* Exhibit 2 (Banerjee Letter).

[17] *Id.*; *see also* LinkedIn Profile of Andrew Strelka (on file with Cause of Action).

[18] *E.g.*, Ama Sarfo, *IRS Can't Dodge Israel-Centric Org's Discrimination Suit*, LAW360 (May 29, 2014), http://goo.gl/1Zbn6Z; *see also* Answer at 10, *Z Street v. Comm'r*, No. 12-401 (D.D.C. filed June 26, 2014) (Andrew Strelka original trial attorney assigned by DOJ), *available at* http://goo.gl/fa7qfQ. Ms. Bringer also represented the Treasury Inspector General for Tax Administration and the IRS in a pair of related FOIA lawsuits concerning the unauthorized disclosure of § 6103 information by the IRS and unauthorized access of that information by the White House. This representation lasted until she withdrew to begin her detail at OWHC. *See* Notice of Withdrawal of Appearance of Norah E. Bringer, *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225 (D.D.C. June 6, 2014).

[19] *The IRS Goes to Court*, WALL. ST. J. (May 6, 2015), http://goo.gl/vXTKHM.

[20] Mem. Op., *Life Extension Found., Inc. v. Internal Revenue Serv.*, 915 F. Supp. 2d 174 (D.D.C. Jan. 15, 2013), *available at* https://goo.gl/NeYtDW (identifying Norah Bringer as trial attorney); *see also* Notice of *In Camera* Submission by Treasury Inspector Gen. for Tax Admin., *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225 (D.D.C. notice filed Nov. 18, 2013) (requesting *in camera* treatment of numerous records, including those protected by § 6103).

Tax Division Attorneys Participate in Legally Questionable "Tax Checks"

After Ms. Bringer served her detail as clearance counsel at the White House, she returned to the Tax Division as Counsel to Caroline D. Ciraolo, the Acting Assistant Attorney General for Tax. This fact raises another issue: the lack of safeguards to protect confidential taxpayer information are especially troubling because those Tax Division attorneys detailed to the White House as "clearance counsel" accessed confidential tax information when conducting "tax checks." There is no evidence, however, that any safeguards exist to protect the confidential information accessed by the detailee when he or she returns to his/her position with the Tax Division, or moves to another position (whether in the government or in the private sector).

Section 6103(g)(2), in relevant part, permits the President to access to tax information regarding an individual under consideration for appointment to a position in the executive or judicial branch. This is known as a "tax check." The information disclosed, however, is limited; for example, the White House is not allowed to obtain "taxpayer returns," but only itemized "return information."[21] When the President accesses information in this manner, it is required to be reported.[22] In contrast, under § 6103(c), the IRS is allowed to disclose returns and return information to the designee of a taxpayer subject to the taxpayer's consent, but without any formal reporting requirements.[23]

The White House uses clearance counsel to conduct tax checks on *potential* nominees via consent – § 6103(c) – instead of § 6103(g), even though Congress specifically required the President to go through a formal process to obtain information. Indeed, no President in modern times has ever made a § 6103(g) request, in large part because it is inefficient – White House consents are made via a signed form whereas § 6103(g) requires a letter from the President – and it is risky – whenever the President accesses tax information outside of consents, Congress is entitled to know whose information he looked at (which is not so under consents).[24] Moreover, when clearance counsel return to the Tax Division, there is no evidence of any safeguards to protect the confidential information they obtained from being disclosed to others. In fact, any notion that the use of consents is an authorized manner for the President to access tax information is a farce. For one, § 6103(c) allows for disclosure to a "person or persons as the taxpayer may designate," whereas the current consent process distributes tax information to multiple individuals in the White House. Second, records reveal that the White House submits

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[21] *See* 26 U.S.C. § 6103(g)(2) (authorizing disclosure of "return information" which "shall be limited" to four items); *see also* J. COMM. ON TAXATION, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976 at 318 (1976) (legislative history of 1976 Tax Reform Act demonstrating Congress's intent to limit President's access to confidential taxpayer returns and return information to mechanisms provided in § 6103(g)).

[22] 26 U.S.C. § 6103(p)(5).

[23] *See* 26 U.S.C. § 6103(c) (authorizing disclosure of "return and return information" to designee of taxpayer); *see also* 26 C.F.R. § 301.6103(c)-1(b)(1) (explaining requirements for such disclosure, including definition of "permissible designees" that may receive confidential returns and return information by taxpayer consent).

[24] *See* Office of Tax Policy, Dep't of the Treas., *Report to the Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions* 72 (Vol. I: Study of General Provisions) (Oct. 2000), *available at* http://goo.gl/p9eo0w; *Tierney v. Schweiker*, 718 F.2d 449, 456 (D.C. Cir. 1983) ("In light of [§ 6103's] legislative history, the IRS cannot use the consent exception of § 6103(c) as a 'catch-all' provision to circumvent the general rule of confidentiality established by Congress."); J. COMM. ON TAXATION, STUDY OF PRESENT-LAW TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS AS REQUIRED BY SECTION 3802 OF THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998, vol. 1, at 228 (2000) (warning IRS about potential for abuse).

the tax check record of a nominee to the appointing agency, which means that such information is disclosed to an unauthorized entity without the taxpayer's consent.

In light of these concerns, on April 15, 2015, Cause of Action requested that the DOJ Inspector General investigate DOJ's practice of detailing attorneys to the White House.[25] To date, the Inspector General has not responded to Cause of Action's request. Further, Cause of Action's requests to the Tax Division, the Professional Responsibility Advisory Office, and other subdivisions of the DOJ have failed to be fully responded to, despite the statutory deadline of FOIA having passed.

It is the Tax Division's responsibility to ensure that tax information – which is at once many Americans' most private information yet the source of the Federal Government's most direct control over citizens – is adequately safeguarded and that the officials who have access to it are lawfully authorized to have such access. The vigilant oversight of this Committee is necessary to ensure that these most basic protections are preserved. Thank you for the opportunity to testify today and I am available to answer your questions.

[25] Letter from Cause of Action to Michael E. Horowitz, Inspector Gen., Dep't of Justice (April 15, 2015), *available at* http://causeofaction.org/assets/uploads/2015/05/261966294-CoA-DOJ-OIG-Letter.pdf.